

**MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN PLLC**

DAVID E. AZAR (SBN 218319)

280 S. Beverly Drive, Suite PH

Beverly Hills, California 90212

Telephone: (213) 617-1200

dazar@milberg.com

**TADLER LAW LLP**

ARIANA J. TADLER (*pro hac vice*)

22 Bayview Avenue

Manhasset, New York 11030

Telephone: (212) 946-9300

atadler@tadlerlaw.com

**DICELLO LEVITT GUTZLER LLC**

Adam J. Levitt (*pro hac vice*)

alevitt@dicellolevitt.com

Ten North Dearborn Street, Sixth Floor

Chicago, Illinois 60602

Telephone: (312) 214-7900

*Appointed Class Counsel; Additional Counsel on Signature Page*

**CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

IN RE CONAGRA FOODS, INC. ) Case No. CV 11-05379-CJC (AGRx)  
)  
) MDL No. 2291  
)  
) **CLASS ACTION**  
)  
) **PLAINTIFFS' SUBMISSION OF**  
) **SUPPLEMENTAL AUTHORITY IN**  
) **SUPPORT OF PLAINTIFFS'**  
) **RENEWED MOTION FOR FINAL**  
) **APPROVAL OF THE SETTLEMENT**  
) **AND AWARD OF ATTORNEYS'**  
) **FEES, EXPENSES AND**  
) **REPRESENTATIVE PLAINTIFFS'**  
) **SERVICE AWARDS**

CV-11-05379-CJC (AGRx)

PLAINTIFFS' SUBMISSION OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF RENEWED MOTION FOR  
FINAL APPROVAL OF THE SETTLEMENT

1 Plaintiffs hereby submit as supplemental authority in support of their Renewed  
2 Motion for Final Approval the attached “Report And Recommendations regarding  
3 Plaintiffs' Motion for Final Approval of Class Action Settlement and Class Counsel's  
4 Motion for Attorneys' Fees, Expenses, and Service Awards” issued on December 15,  
5 2021, by Magistrate Judge Jonathan Goodman in *Williams et al v. Reckitt Benckiser*  
6 *LLC et al.*, Case 1:20-cv-23564-MGC, pending in the U.S. District Court for the  
7 Southern District of Florida (“*Williams R&R*”). (**Exhibit A.**). While Plaintiffs  
8 understand that the *Williams R&R* is not yet binding, for the reasons stated herein, it is  
9 helpful to the Court in performing its analysis of the settlement on remand.  
10  
11  
12

13 The *Williams R&R* is pertinent because in that case, Mr. Frank, as the objector,  
14 raised many similar arguments to the ones he raised before this Court. The *Williams*  
15 Magistrate Judge analyzed Mr. Frank’s objections in detail (*e.g.*, collusion, clear  
16 sailing, kicker provision, *Pearson*, adequacy of settlement).<sup>1</sup> Although it is still subject  
17 to objections and review by the Florida district court, the Court may find the well-  
18 reasoned *Williams R&R* helpful to it here.  
19  
20

21 For the Court’s convenience, Plaintiffs set forth below the most relevant portions  
22 of the *Williams R&R* which are found at pages 82-85, 87-88, 98-99, 101-105, and in  
23

---

24 <sup>1</sup> The *Williams* case also involves one of the same law firms as in the present case,  
25 Milberg Coleman Bryson Phillips Grossman PLLC.

1 particular, the following passages:

2  
3  
4 p. 82

5 Frank and [Truth in Advertising, Inc.] TINA argue that the amount of  
6 the settlement is inadequate, but this position seems to ignore the  
7 principle that the possibility of a higher monetary award at trial does not  
8 in and of itself mean that the Court should reject the settlement. *See e.g.,*  
9 *In re Chicken Antitrust Litig.*, 560 F. Supp. 957 (N.D. Ga. 1980) (“The  
10 court’s task is one of balancing the probabilities, not assuring that the  
11 plaintiff class receives every benefit that might have been won after a  
12 full trial.”).

13  
14 p. 83

15 Because “[m]onetary relief is difficult to quantify,” in evaluating a class  
16 settlement, “the Court’s role is not to engage in a claim-by-claim, dollar-  
17 by-dollar evaluation, but rather, to evaluate the proposed settlement in its  
18 totality.” *Lipuma*, 406 F. Supp. 2d at 1322-23 (finding that settlement  
19 recovering 8.1% of possible damages was fair, adequate, and  
20 reasonable). “[T]he fact that a proposed settlement amounts to only a  
21 fraction of the potential recovery does not mean the settlement is unfair  
22 and inadequate . . . A settlement can be satisfying even if it amounts to a  
23 hundredth or even a thousandth of a single percent of the potential  
24 recovery[.]” *Behrens v. Wometco Enter. Inc.*, 118 F.R.D. 534, 542 (S.D.  
25 Fla. 1988).

p. 84-85

Frank and TINA argue that the touted dollar value of the settlement is illusory and substantially overstated because the actual money paid out will be far less than \$8 million and because the unpaid settlement funds will revert back to (or, to be more technically correct, will *remain* with Defendants). [Emphasis in original.]

But these types of claims-made class action settlement [sic] are frequently approved, even if unclaimed funds revert to defendants. *See Casey v. Citibank*, No. 12-cv-820 (N.D.N.Y.) (ECF No. 222 at ¶ 6) (approving virtually identical claims-made settlement and finding that regardless of the take rate, “[t]he settlement confers substantial benefits upon the Settlement Class members, is in the public interest, and will provide the parties with repose from litigation”); *Shames v. Hertz Corp.*, No. 07-cv-2174, 2012 WL 5392159 (S.D. Cal. Nov. 5, 2012) (approving claims-made settlement over objections because “there is nothing inherently objectionable with a claims-submission process, as class action settlements often include this process, and courts routinely approve claims-made settlements”) (citations omitted); *Lemus v. H & R Block Enters. LLC*, No. 09-cv-3179, 2012 WL 3638550 (N.D. Cal. Aug. 22, 2012) (approving, over objections, claims-made settlement in wage case where unclaimed funds reverted to the defendants); *Atkinson v. Wal-Mart Stores, Inc.*, No. 8:08-cv-00691-T-30TBM, 2011 WL 6846747, at \*5 (M.D. Fla. Dec. 29, 2011) (approving claims-made

1 settlement with full reversion in class action case involving the estates of  
2 persons whose lives were insured under Corporate Owned Life  
3 Insurance policies purchased by Wal-Mart or a Wal-Mart Trust while  
4 they worked as Wal-Mart associates in Florida and whose deaths  
5 resulted in the payment of insurance policy benefits to Wal-Mart or the  
6 Trust).

7  
8  
9 p. 87

10  
11 Indeed, while a clear-sailing provision could indicate that the settling  
12 parties compromised class members' interests to give class counsel  
13 favorable treatment on attorney's fees, it could just as easily be included  
14 for purposes of finality and risk avoidance. *See Malchman v. Davis*, 761  
15 F.2d 893, 905 n.5 (2d Cir. 1985) (a clear-sailing provision "is essential  
16 to completion of the settlement, because the defendants want to know  
17 their total maximum exposure and the plaintiffs do not want to be  
18 sandbagged"); *see also Poertner*, 618 F. App'x at 630 (rejecting  
19 objections -- raised by Frank, coincidentally -- based on clear sailing and  
20 kicker clauses because "Frank's self-dealing contention is belied by the  
21 record: the parties settled only after engaging in extensive arms-length  
22 negotiations moderated by an experienced, court-appointed mediator").

23 P. 88  
24  
25  
26

1 As explained earlier in this Report, there was no collusion. And absent  
2 collusion, a clear-sailing provision should not bar a class settlement's  
3 approval, as courts in this Circuit have repeatedly emphasized. *See, e.g.,*  
4 *Poertner*, 618 F. App'x at 630 (per curiam); *Waters v. Int'l Precious*  
5 *Metals Corp.*, 190 F.3d 1291, 1293 n.4 (11th Cir. 1999) (summarizing  
6 different views but declining to address the clear sailing provision  
7 because appellate court was convinced that district judge fulfilled the  
8 Rule 23 supervisory function); *Fladell v. Wells Fargo Bank, N.A.*, No.  
9 0:13-cv-60721, 2014 WL 5488167, at \*4 (S.D. Fla. Oct. 29, 2014)  
10 (rejecting argument about clear-sailing provision as “immaterial”  
11 because there “was no collusion in the settlement negotiations and the  
12 [p]arties began negotiations regarding attorney’s fees only after finishing  
13 the negotiating the Settlement itself”); *Ingram*, 200 F.R.D. at 693  
14 (rejecting argument that collusion was present in the Settlement, noting  
15 that a highly experienced mediator was involved and reasoning that  
16 “[p]arties colluding in a settlement would hardly need the services of a  
17 neutral third party to broker their deal”).

1 p. 98-99

2 **The Contingent Nature of the Fee, the Financial Burden Carried by**  
3 **Counsel, and the Economics of Prosecuting a Class Action:** A

4 determination of a fair fee for Class Counsel must include consideration  
5 of the contingent nature of the fee, the outlay of out-of-pocket expenses  
6 by Class Counsel, and the fact that the risks of failure and nonpayment  
7 in a class action are extremely high -- with the risk of failure the  
8 foremost factor. *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d  
9 1334, 1339 (S.D. Fla. 2007). In this case, Class Counsel received no  
10 compensation during the litigation, incurred expenses with no guarantee  
11 of repayment, and faced a substantial risk that after protracted, complex,  
12 and expensive litigation, the Class and Class Counsel could end up with  
13 no recovery at all.

14  
15 The fee award was contingent on a good result -- Class Counsel would  
16 have recovered nothing if it had not secured recovery for the class. “For  
17 a complex and sophisticated case such as this one, class counsel took  
18 considerable financial risk in pursuing the case.” *Saccoccio*, 297 F.R.D.  
19 at 695.

20  
21 The risks undertaken by class counsel in class actions are often  
22 “exacerbated by the existence of competing parallel proceedings in other  
23 courts, which may reach settlement or certification first, and the  
24

1 considerable amount of labor that is usually undertaken to litigate a class  
2 action to resolution.” *Wilson*, 2016 WL 457011, at \*19.

3  
4 And these results were real possibilities -- a court in a similar case  
5 decertified the class after a hung jury mistrial.

6  
7 P. 101

8 **The Skill, Experience, and Reputation of Class Counsel:** This  
9 litigation required a high degree of skill and experience. Class Counsel  
10 have decades of experience successfully litigating national class actions.  
11 Beyond that, Class Counsel’s reputation, diligence, expertise, and skill  
12 are reflected in how they have handled this case and the results they have  
13 achieved. They resolved this dispute efficiently and effectively despite  
14 the potential hurdles presented and the arguments raised by Defendants  
15 detailed above. The quality of Class Counsel and their achievement in  
16 this case is equally shown by the strength of their opponents, Perkins  
17 Coie LLP and Bilzin Sumberg Baena Price & Axelrod LLP, who are  
18 excellent defense firms. (Bryson Decl., ¶ 13 [ECF No. 69-1])  
19 (mentioning the Perkins Coie firm). This factor thus also favors  
20 awarding the requested fee.

21  
22 P. 105

23 The Seventh Circuit similarly rejected the settlement in *Pearson v.*  
24 *NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), a case which Frank relies upon  
25 repeatedly in his Objection Memorandum [ECF No. 75, pp. 1, 4, 25, 26,

1 27, 28), because the district court had valued the settlement to include  
2 the costs of notice to the class and attorney's fees, and of the \$5.63  
3 million to be made available to the class, approximately \$4.77 million  
4 was reserved solely for counsel fees and expenses, notice costs, and *cy*  
5 *pres* and service awards, with only \$865,284 left for the settlement class,  
6 which amounted to only **seven cents per class member**. *See id.* at 780-  
7 81, 783–84. [Emphasis in original.]

8  
9 The *Pearson* Court also criticized the claim form and filing requirements  
10 as too onerous when weighed against the “low ceiling on the amount of  
11 money that a member of the class could claim[,]” *id.* at 783; the *cy pres*  
12 award as excessive when weighed against the minimal relief made  
13 available to class members, *id.* at 784; the potential ineffectiveness of the  
14 proposed injunctive relief, *id.* at 785; and the court's sense that the  
15 parties had colluded to “sell out the class by agreeing ... to recommend  
16 that the judges approve a settlement involving a meager recovery for the  
17 class but generous compensation for the lawyers[.]” *See id.* at 787 (citing  
18 *Eubank*, 753 F.3d at 720).

19  
20 As discussed in detail above, the relief provided by this Settlement,  
21 however, stands in stark contrast to the relief provided in *Eubank* and  
22 *Pearson* and in almost every other respect.  
23  
24  
25  
26

Respectfully submitted,

Dated: December 16, 2021

/s/ David E. Azar

David E. Azar (SBN 218319)  
dazar@milberg.com  
**MILBERG COLEMAN BRYSON  
PHILLIPS GROSSMAN PLLC**  
280 S. Beverly Drive, Suite PH  
Beverly Hills, California 90212  
Telephone: (213) 617-1200

Ariana J. Tadler (*pro hac vice*)  
atadler@tadlerlaw.com  
A.J. de Bartolomeo SBN 136502  
ajd@tadlerlaw.com  
**TADLER LAW LLP**  
22 Bayview Avenue, Suite 200  
Manhasset, New York 11030  
Telephone: (212) 946-9453

Adam J. Levitt (*pro hac vice*)  
alevitt@dicellolevitt.com  
Amy E. Keller (*pro hac vice*)  
akeller@dicellolevitt.com  
**DICELLO LEVITT GUTZLER  
LLC**  
Ten North Dearborn Street,  
Sixth Floor  
Chicago, Illinois 60602  
Telephone: (312) 214-7900

***Class Counsel***

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on December 16, 2021, he caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to registered counsel of record for each party.

Dated: December 16, 2021

*/s/ David E. Azar*

---

David E. Azar (SBN 218319)